

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1157

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

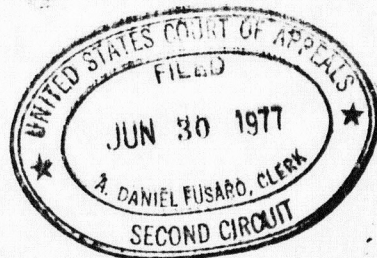
Docket No. 77-1157

JAMES R. LORD, JR., GERHARD J. SCHWARTZ,
and GERALD J. YAGY,

Defendants-Respondent.

BRIEF FOR APPELLANT,
GERALD J. YAGY

WITH APPENDIX



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QUESTIONS PRESENTED

1. Was defendant Yagy entitled to dismissal of the case for failure to timely try the case pursuant to 18 U.S.C. Sections 3161-3174, Sixth Amendment and Rule 48(b)?
2. Were there sufficient grounds to grant defendant Yagy's motion for severance?
3. Were there sufficient ⁱⁿ ~~and~~ proper inferences and statements made on the part of the prosecution so as to constitute a prosecutorial misconduct?
4. Should the post indictment-arrest statement of defendant Schwartz have been admitted into evidence?
5. Were there improper inferences of prior and subsequent criminal conduct imposed against defendant Yagy?
6. Should the pre-indictment and pre-arrest exculpatory statement of defendant Lord have been admitted into evidence?
7. Did the Trial Court err in the standards applied pursuant to Federal Rules of Evidence 104 on the issue of conspiracy, and did the Court err in its repeated comment before the jury that a prima facie showing on conspiracy had been established prejudicial to defendant Yagy?

8. Was there a failure of proof on the charge of bank robbery and/or conspiracy against defendant Yagy?
9. Did the sum of any errors amount to reversible errors?
- 10a. Were the sentences given defendant Yagy cruel and unusual punishment?
- b. Were said sentences excessive under the circumstances prevailing?
- c. Did the Court err in sentencing defendant Yagy separately for conspiracy and as an aider and abettor?

STATEMENT OF THE CASE

This is an appeal on behalf of defendant, Gerald J. Yagy, from the judgment of the District Court of the Western District of New York rendered March 22, 1977, convicting defendant, Gerald J. Yagy (hereinafter referred to as defendant Yagy) after trial by jury, of the crimes of bank robbery in violation of 18 U.S.C. Section 2133(a) and conspiracy in violation of Section 18 U.S.C. Section 371. Defendant Yagy was sentenced upon said conviction on March 22, 1977, to consecutive terms of imprisonment, as follows:

- a. On the bank robbery, to a term of ten years;
- b. On the conspiracy, to a term of five years.

STATEMENT OF THE FACTS

On April 9, 1976, Columbia Banking Savings & Loan Association branch bank was robbed by two persons whose identity was unknown because of masks, coveralls and other paraphernalia worn by the perpetrators.

On April 9, 1976, an FBI agent and others interviewed defendant, James R. Lord, Jr. (hereinafter referred to as defendant Lord) at his residence regarding the subject bank

robbery. The police and FBI agents did not know or have reason to believe that defendant Lord was involved in said robbery, except that he had been previously convicted of bank robbery and was on parole (T.M. at 237). There is no evidence that defendant Lord was given any Miranda rights. Agent Van Zandt testified, at trial, as to certain exculpatory statements made by defendant Lord regarding himself (T.M. at 374-406). The prosecution introduced testimony through Mrs. America DeCastro that defendant Lord's exculpatory statements were false (T.M. at 429-444).

During the month of July, 1976, Ronald Hook, an unindicted co-conspirator (hereinafter referred to as witness Hook) furnished statements to the Rochester Police, the FBI and other police agencies, that he had participated in the Columbia Bank robbery as the driver of the getaway car; that he was introduced by defendant Yagy to defendant Lord on the basis that if witness Hook needed some money defendant Lord was looking for a driver for a robbery; that subsequently defendant Lord, witness Hook, and defendant Yagy drove over the alleged course of the proposed robbery, and that subsequently witness Hook was introduced to defendant Schwartz through defendant Lord, and that witness Hook and defendants Lord and Schwartz robbed the subject Columbia Bank on April 9, 1976. (T.M. at 445-525). Parenthetically, at

the time that witness Hook furnished these statements to the local police and FBI agents, witness Hook was suffering from numerous stab wounds that he had sustained within 24-48 hours prior to giving said statements. Witness Hook also furnished statements to the same police representatives regarding another robbery that occurred in July 1976, and he allegedly identified his assailants to have been defendants Lord and Schwartz.

The FBI caused complaints and warrants of arrest to be issued against defendants Schwartz, Lord and Yagy, on or about July 20, 1976. Defendant Lord was apprehended shortly thereafter. Defendant Yagy, through the intercession of his attorney, voluntarily surrendered himself to the custody of the FBI and was arraigned before a magistrate on July 26, 1976, although arrangements for said surrender had been made during the evening hours of July 23, 1976. (T.M. at 393-397).

Defendants Schwartz, Lord and Yagy were indicted by a Federal Grand Jury and the indictment filed on July 29, 1976, and defendant Yagy was arraigned before District Court Judge Harold Burke on July 30, 1976. Defendant Schwartz was not apprehended until he was arrested pursuant to a fugitive warrant on November 22, 1976, at which time defendant Schwartz gave statements regarding three separate criminal actions, the first involving the Columbia Bank robbery of April 9,

1976, the second regarding a Wegmans Super Market robbery that occurred on or about July 5, 1976, and a third regarding the attempted homicide of witness Hook that occurred during the middle of July 1976. Each of said statements was given in dual fashion, that is one set of statements implicating defendant Schwartz alone for each of said incidents, and a dual set of statements for each involvement implicating defendant Schwartz and others. (T.M. at 6-8). Defendant Schwartz was arrested at an apartment in the Bronx, New York, at approximately 8:30 A.M.; he was brought from the apartment to the FBI's local office in New Rochelle, New York, for purposes of processing and interrogation during which period of time defendant Schwartz gave the statements as hereinbefore mentioned, and eventually he was transferred to Manhattan where he was requestioned by an Assistant U.S. Attorney and then brought before a U.S. Magistrate for arraignment at approximately 4:30 P.M. on the same date, at which time he was assigned an attorney.

Defendant Yagy, on or about September 1, 1976, brought on a motion returnable September 13, 1976, before the Honorable Harold Burke for various and numerous items of relief, including the discovery and production of documents and statements and dismissal of indictment, among other things. Said motion

was adjourned from time to time and re-assigned from Judge Burke to District Court Judge Elfvin because of Judge Burke's illness and eventually said motion was argued before Judge Elfvin on October 25, 1976, although, at that time, the Assistant U.S. Attorney had not served upon defendant Yagy's attorney any answering affidavits in response to said defendant's pretrial motions; that the Assistant U.S. Attorney's answering documents were finally served on defendant Yagy's attorney on December 28, 1976; that between December 24, 1976 and January 9, 1977 defendant Yagy's attorney was on vacation and defendant Yagy's response to the Government's answering documents and said defendant's motion for severance were served on January 21, 1977. Further arguments for pretrial discovery, including continued argument of motion for severance, was held on January 25, 1977, at which time the Court denied defendant Yagy's motion for severance and the Court reserved its decision to dismiss indictment pending the Court's review of the subject Federal Grand Jury minutes. A trial date was set for February 8, 1977. Defendant agreed that the time period from January 25, 1977 to February 8, 1977, would be chargeable to defendant Yagy and not to the Government.

Immediately prior to the commencement of the trial, attorneys for all defendants moved to limit the prosecution's testimony so as to exclude therefrom any reference to the alleged Wegmans Super Market robbery that occurred on or about July 5, 1976, and any reference to the stabbing or attempted homicide of witness Hook, which occurred during mid-July 1976, on the grounds that said testimony would be highly prejudicial to each and every one of the defendants; that it was not relevant to the charge of bank robbery, armed robbery or conspiracy as the same related to the Columbia Bank robbery that occurred on or about April 5, 1976; that according to witness Hook's alleged statements to the police authorities, two of the three defendants were his assailants; therefore, such statement or statements would be most prejudicial to defendant Yagy, who was not identified as an assailant; that it would appear that the prosecution's chief witness would be witness Hook, an unindicted co-conspirator; that any reference to a stabbing would lend credence to his testimony, especially when there was no proof that said stabbing was related to the bank robbery and for various other reasons. The trial court expressed its opinion that the Wegmans Super Market robbery should not be made part of the case unless something, of

course, developed during the course of the trial and that the prosecution was forewarned to be most careful in any attempt it might make in introducing reference to the stabbing of witness Hook, because the prosecution would then be treading on tenuous grounds and might very well be subject to a motion for mistrial, and if there were a conviction a possible reversal. (T. 1/25/77, 48-57, T. 2/8/77, 44-54, 74-75, 159-162; T.M. 407-408, 509-524, 535, 541-542). Contrary to these instructions, the prosecution continued in its efforts to introduce the "stabbing" at the trial although witness Hook denied, under oath, that the stabbing was connected to the bank robbery (T.M. 522).

The Court made a finding that the conspiracy ended April 9, 1976 (T.M. 906-907); the Court dismissed the Armed Robbery charge (18 U.S.C. Section 2113(d)) against defendant Yagy (T.M. 742) and the Court further found that the conspiracy charge against Mr. Yagy under 18 U.S.C. Section 371 related to count 1 (Bank Robbery) of the indictment, which was a violation of 18 U.S.C. Section 2113(a). The Court further instructed the jury with respect to defendant Schwartz's post indictment, post arrest and post termination-conspiracy statement and its use, as follows:

" * * * Mr. Schwartz's admissions, if you find them to have been made voluntarily and intentionally, can be used only as against him. Any conspiracy to rob the Savings and Loan Association had by November 22, 1976 come to an end, and, of course, you will remember that that was the date as of which that statement was given. His statement as of that date could not be chargeable to any co-conspirator if, in fact, you found there was a conspiracy and that he and another defendant were members at some time. As I have indicated to you, there is no evidence to support the continuance of the conspiracy beyond April 9, 1976. In any event, you would recognize that an admission of guilt would not be an act or statement in furtherance of the aim of the conspiracy. However, I tell you this one thing, if you have found that there was a conspiracy and that Mr. Schwartz was a member of the conspiracy on April 9, 1976, which is the alleged date of the robbery of the Savings and Loan Association, and if you find that, for example Mr. Yagy or Mr. Lord was also a member of that same conspiracy at the same time, and if you decide on the basis of the admission, or otherwise, that Mr. Schwartz did what he says in the statement he did do, then what he did do on April 9, 1976 could be useable against and charged against those other defendants who you found to be members at that same time. So the making of the statement on November 22 cannot itself be used against any other defendant, but if on the basis of that, and otherwise, you find that Mr. Schwartz, for example, did participate in the robbery of this association on April 9, and there was a conspiracy for that, and Mr. Lord or Mr. Yagy was a member, then Mr. Schwartz's actions on the 9th of April are chargeable against Mr. Lord or Mr. Yagy if they were members at that time." (T.M. 932-934).

Defendant Yagy requested a clarification of this charge with the following request:

"Mr. Colicchio: Yes. On behalf of the defendant Yagy, I request that the Court charge the jury that it can't find Mr. Yagy was a member of the conspiracy by reason of Mr. Schwartz's statement, attributed to him that occurred sometime in November.

The Court: That is true. I said when you are determining whether someone is a member of a conspiracy, you must look only to that person's own acts and statements, you do not look to anything someone else did or said outside of that person's presence. So as to Mr. Yagy, you must look to what he did, what he said, or what was done or said in his presence in determining whether or not Mr. Yagy was a member of the conspiracy." (T.M. 940)

Defendant Lord's attorney made a further request for a clarification of said charge and the Court again stated:

"I think I have said this twice, but again I want to make sure you understand. This concerns a statement made by Mr. Schwartz on November 22, 1976. The giving of the statement, obviously, at a time when there was no longer a conspiracy cannot itself weigh against any other defendant. If from the statement, and with or without other evidence, you decide that Mr. Schwartz on April 9, 1976 did certain acts in the bank robbery, and if you have found that there was a conspiracy at that time, and Mr. Schwartz was a member at that time, and another defendant or defendants was a member at that time, then those actions of Mr. Schwartz on the 9th can be used against the other defendants, but his statement made later cannot be. Does that meet your approval?" (T.M. 941).

Defendants Schwartz and Lord were found guilty by the jury on counts 1, 2 and 3. The Court dismissed count 2 against defendant Yagy and the jury found defendant Yagy guilty on counts 1 and 3. Defendant Yagy subsequently was sentenced, as above stated, and has appealed to this Court from said convictions from all proceedings and judgments had thereon.

POINT I

THE TRIAL COURT ERRED WHEN IT DENIED
DEFENDANT YAGY'S MOTION TO DISMISS
INDICTMENT PURSUANT TO 18 U.S.C.
SECTIONS 3161-3174; SIXTH AMENDMENT
OF THE U.S. CONSTITUTION AND RULE
48(b) OF FEDERAL RULES OF CRIMINAL
PROCEDURE.

The FBI caused a complaint and a warrant for the arrest of defendant Yagy to be issued on July 20, 1976; defendant Yagy voluntarily surrendered himself and was arraigned before a U.S. Magistrate on July 26, 1976, indicted on July 29, 1976, and was arraigned by a U.S. District Court Judge on July 30, 1976.

Said defendant promptly moved for various pretrial motions including discovery, Bill of Particulars, production of documents, inspection of Grand Jury minutes, and for dismissal of the indictment on various grounds. The motion was originally returnable on September 13, 1976. The Government did not finally serve answering affidavits in opposition thereto until December 28, 1976, although during the interim the Government had served notices that it was ready for trial to try defendants Yagy and Lord together and without defendant Schwartz who, at that time, had apparently fled from the community and whose whereabouts was unknown. Finally, said motion was argued before

Judge Elfvin on October 25, 1976, and was not concluded until at least January 21, 1977, when final answers or decisions were made by Judge Elfvin or responses given by the Assistant U.S. Attorney. A motion for severance was made on January 21, 1977, and denied on January 25, 1977. It is defendant Yagy's contention that from July 20, 1976, the date that the FBI caused a complaint and a warrant for the arrest of defendant Yagy to be issued, to January 25, 1977, approximately 190 days had transpired, and that at least 184 days had transpired from the date that defendant Yagy submitted himself to the jurisdiction of the Court through his arraignment before the Magistrate and that the delay in bringing this case to trial was not related in any way to defendant Yagy's medical care and treatment at the Veterans Administration Hospital in Batavia, New York, but rather was caused as a result of the prosecution's delay in submitting answering affidavits to the pretrial motion papers, the argument of the motion and the Court's failure to respond to said motions, until sometime in January 1977. Defendant Yagy is aware that pretrial motions may be considered excludable time. However, defendant waited from September 1, 1976 to December 28, 1976, to receive prosecution's answering affidavits in response to said defendant's pretrial motions. Defendant contends that said delay is unreasonable and inordinate and, therefore, should not be considered as excludable time. Defendant Yagy maintains

that he was denied a speedy trial pursuant to 18 U.S.C. Section 3161-3174; that there was undue delay in violation of the Sixth Amendment of the Federal Constitution and Rule 48(b) of F.R. Crim. P. Defendant Yagy further contends that he was prejudiced by said delay for the following reasons:

1. Defendant Yagy could have been tried without defendant Schwartz.

2. Defendant Schwartz's fleeing from the community and evidence of his appearance and the manner in which he was apprehended by the FBI in the Bronx, New York, during the latter part of November 1976, was prejudicial to defendant Yagy.

3. Defendant Schwartz's statement obtained November 22, 1976, although implicating defendant Schwartz only, supported testimony given by witness Hook on at least ten or eleven different factors, thus lending credibility and sustenance to witness Hook's testimony.

4. Defendant Schwartz's production of two medical doctors to testify that he was not physically able to participate in the bank robbery due to certain medical and physical conditions was totally improper, incredible and beyond belief, when defendant Schwartz and his counsel apparently knew that said doctors would testify just to the contrary relating to defendant Schwartz's physical condition.

5. Testimony of witness Dennis Wakefield regarding defendant Schwartz and another person by the name of "Jimmy" (last name unknown) attempting to rob a bank approximately a week prior to the Columbia Bank robbery of April 4, 1976.

6. The FBI agent, Richard Berry's, testimony regarding various items found in defendant Schwartz's apartment, including a pistol, false identification, pinch bars, handcuffs, among other things.

7. The prosecution's attempt to introduce the stabbing of witness Hook and connecting it to the subject bank robbery, which stabbing allegedly was caused or performed by defendant Schwartz.

Defendant Yagy contends that if he were tried alone without defendant Schwartz, said prejudicial items undoubtedly would not have been introduced or attempted to have been introduced during Yagy's trial, separate and apart from defendant Schwartz.

POINT II

THE COURT ERRED WHEN IT DENIED
DEFENDANT YAGY'S MOTION FOR
SEVERANCE.

Although defendants Lord, Schwartz and Yagy were indicted on July 29, 1976, defendants Lord and Yagy were either apprehended or surrendered to the Court's jurisdiction on or before July 30, 1976. Pretrial motions had been made by defendants Lord and Yagy. The Government had issued notices on several occasions prior to November 22, 1976 that it was ready for trial and that it would try defendants Lord and Yagy in spite of the fact that the Government apparently did not know of the whereabouts of defendant Schwartz. The only reason the cases had not been tried prior to the actual date was that the Government had failed to respond to defendants Lord's and Yagy's pretrial motions in a timely fashion. Defendant Yagy had not brought on a motion for severance because, in his opinion, there was no need to do so until after it was learned that defendant Schwartz had been apprehended and eventually returned to Rochester, New York, during the month of December 1976. Defendant Yagy's motion for severance was brought on on or about January 21, 1977. The bases of the motion were:

1. Numerous statements made by defendant Schwartz which implicated defendant Schwartz individually and others, including defendant Yagy, regarding the subject Columbia Bank robbery, and the so-called Wegmans Super Market robbery.

2. That defendant Schwartz gave additional statements implicating himself and defendant Lord with respect to the subject Columbia Bank robbery and the attempted homicide of witness Hook.

3. That the statements given by defendant Schwartz could not, and should not, be used against defendant Yagy.

4. That any attempts by the Court by way of instructions to the jury that defendant Schwartz's statement should be limited to defendant Schwartz would be psychologically impractical since three defendants would be sitting together on trial as codefendants and co-conspirators; that the reading of defendant Schwartz's statement implicating himself, which would psychologically have a spillover effect upon defendant Yagy, would deprive defendant Yagy of his rights of cross-examination and such rights that he may have under the Sixth Amendment, and such other constitutional rights under the Federal Constitution.

5. That both defendants Lord and Schwartz had, upon information and belief, extensive criminal and felony records; defendant Schwartz did, in fact, flee the City of Rochester, New York, in or about July 1976, and was not apprehended until the latter part of November 1976, by virtue of a fugitive warrant, and that the cumulative effect of all the aforementioned items, presented to the jury in one fashion or another, in whole or in part, would be prejudicial to defendant Yagy and that regardless of the Court's instructions to the jury, defendant Yagy would run a high risk that the jury would associate some probative value of guilt as a result of the actions of defendant Schwartz to defendant Yagy.

6. In addition to the foregoing, we reiterate various points referred to in itemized fashion under POINT 1, as the same relate to defendant Schwartz. It would appear, at first blush, that the Court and the prosecution avoided the problem referred to in Bruton vs. U.S., 391 U.S. 123 (1968) by simply introducing Schwartz's statement implicating himself alone. However, the Court's instructions to the jury as to the use that could be made of certain facts found as a result of defendant Schwartz's statement accomplished what the Bruton rule seemed to prohibit, and that is allowing the jury to make certain findings from one codefendant's statements and applying

it to another codefendant when the declarant codefendant never took the stand or testified under oath in some fashion. Defendant Yagy contends that much of the evidence admitted at the joint trial would not, and could not, have been admitted at defendant Yagy's separate trial, and that as a result thereof he was severely prejudiced. The items complained of are:

A. Prosecution's reference on voir dire in opening statement to witness Hook's having been stabbed. At least two prospective jurors stated that they could not remove such a comment from their minds when considering the guilt or innocence of the defendants, and as a result they were excused. It is apparent that the remaining jurors were at least subconsciously tilted toward the comments and expressions made by the two prospective jurors who were eventually discharged.

B. Defendant Dennis Wakefield's testimony about defendant Schwartz and another's attempt to rob a bank at least a week prior to April 9, 1976.

C. Identification of defendant Schwartz and possibly defendant Lord during the attempted bank robbery a week prior to April 9, 1976.

D. Schwartz's inculpatory statement as it related to himself alone obviously weakened defendant Yagy's case and

strengthened the case of the prosecution.

E. Defendant Schwartz's fleeing from the community and being apprehended under a fugitive warrant and the circumstances of his arrest and apprehension.

F. Defendant Lord's allegedly false exculpatory statements and the witnesses who were called relating to said statements.

G. Approximately \$1300.00 or \$1500.00 being found on defendant Lord on the day of the bank robbery, although defendant Lord claims to have been unemployed for some period of time due to illness.

H. The search conducted of defendant Schwartz's apartment and the items discovered as a result of said search. Rules 8(a) and (b), 13, 14 and 15, F.R. Crim. P.; U.S. vs. Crouch, 528 F. 2d 625 (7th Cir. 1976) cert. den. U.S. (1977); U.S. vs. Ragghianti, 527 F. 2d 586 (9th Cir. 1975); Bruton vs. U.S., 391 U.S. 123 (1968); U.S. vs. Bolden, 514 F. 2d 1301 (D.C. Cir. 1975); U.S. vs. Peterson, 524 F. 2d 167 (4th Cir. 1975); Cert. denied, 423 U.S. 1088 (1976); U.S. vs. Truslow, 530 F. 2d 257 (4th Cir. 1975); U.S. vs. Ong, 541 F. 2d 331 (2d Cir. 1976), 20 Cr. L. 2043 ; U.S. vs. Floyd, F. 2d (2d Cir. 5/16/77, #76-1462), 21 Cr. L. 2198.

POINT III

THE PROSECUTORIAL STATEMENTS REGARDING "STABBING" OF PROSECUTION WITNESS ON VOIR DIRE, ATTEMPTS TO BRING OUT "STABBING" OF PROSECUTION WITNESS HOOK, AND REFERENCE TO SAID WITNESS'S PHYSICAL CONDITION AND IN HOSPITAL DURING THE PROSECUTION'S CASE IN CHIEF, AND REFERENCE BY PROSECUTION TO DEFENDANT HOOK'S BEARING "SCARS FOR LIFE" DURING SUMMATION WAS PREJUDICIAL TO DEFENDANT YAGY, AND COURT ERRED IN DENYING NUMEROUS MOTIONS FOR A MISTRIAL OR SEVERANCE.

The prosecution during the voir dire and opening statement made reference to the fact that the prosecution witness, Hook, had been stabbed; that during parts of the prosecution's case in chief evidence was brought out that witness Hook had given statements to police or FBI while in the hospital and in serious condition, and during summation, prosecuting attorney referred to witness Hook as having scars for life. All defendants vigorously objected to the use of said phraseology and moved for severance and/or mistrial on numerous occasions. The Court admonished and forewarned prosecuting attorney that he was treading in an extremely sensitive area and that he should not proceed along these lines unless he could in fact connect the alleged stabbing with the subject bank robbery. Eventually, witness Hook denied under oath that the stabbing was connected with the bank robbery. In addition, the prosecution repeatedly referred, through witness Hook, said witness's social acquaintanceship with defendant Yagy and their so-called gambling

adventures at various "social clubs."

A trial court should take all reasonable measures to avoid a situation where " * * * the jury might convict not for the crime charged, but because, as evidenced by other criminal conduct, the accused is a person deserving of punishment (citations omitted)." People vs. Fiore, 35 N.Y. 2d 81, 84 (1974).

The courts have long attempted to exclude such evidence from the decision making process juries, in absence of some materiality that would outweigh the inherent prejudice. Federal Rules of Evidence, R404(b); Michelson vs. Eulas, 335 U.S. 469 (1948); Hamling vs. U.S. 418 U.S. 87, 127 (1974); U.S. vs. Hale, 422 U.S. 171, 173, 180 (1975).

The courts have consistently frowned upon prosecutorial prejudicial statements whether made on voir dire, opening statement, during the course of trial, or on summation, especially if the same violates a defendant's due process rights under the Fifth and Sixth Amendments of the Federal Constitution or deprives a defendant of a fair trial. The United States Supreme Court has recognized that the United States Attorney is a representative of the Federal Government, his interest in criminal prosecution is not that it shall win the case but rather that justice shall be done, and that said prosecuting attorney is in a peculiar and very definite sense the servant of the law,

the twofold aim which is that guilt shall not escape nor innocence suffer, and that the United States Attorney may and should prosecute with earnestness and vigor, and while he may strike hard blows, he is not at liberty to strike foul blows, it being as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger vs. U.S., 295 U.S. 78 (1935); Viereck vs. U.S., 318 U.S. 236 (1943); U.S. vs. Wallace, 453 F.2d 420 (8th Cir. 1972), Cert. denied, 406 U.S. 961 (1972); Douglas vs. State of Alabama, 380 U.S. 415 (1965); Namet vs. U.S., 373 U.S. 179 (1963); U.S. vs. Fearns, 501 F.2d 486 (7th Cir. 1974); U.S. vs. Davis, 532 F.2d 22 (7th Cir. 1976); Minker vs. U.S., 85 F.2d 425 (3D Cir. 1936); U.S. vs. Bivona, 487 F.2d 443 (2D Cir. 1973); U.S. vs. Burse, 531 F.2d 1151 (2D Cir. 1976).

Evidence of other similar acts or crimes, are generally not admissible to prove a defendant's propensity to commit a crime charged, although it may be admissible for other relevant purposes unless its probative value is outweighed by its prejudicial effect upon the defendant. U.S. vs. Jones, 438 F.2d 461 (7th Cir. 1971); McCormick, Evidence Section 190, pp. 447-454 (2DED 1972). It would appear, with respect to the issue of materiality and of consequence, pursuant to Rule 402 of Criminal Rules of Evidence that where an identity issue is not material, such as a bank robbery and

conspiracy case, especially where witness Hook testified that he knew defendant Yagy and has known him for several years, any proof of prior gambling activities between witness Hook and defendant Yagy is entirely irrelevant and, therefore, not admissible. Its purpose is solely to prejudice the jury.

U.S. vs. Park, 525 F. 2d 1279 (5th Cir. 1976); U.S. vs. Ciriaco, 510 F.2d 69 (2d Cir. 1975). The proper practice is to exclude evidence that may otherwise be relevant if its probative value is outweighed by the danger of misleading or unfairly prejudicing a jury. U.S. vs. Hathaway, 534 F. 2d 386 (1st Cir. 1976), Cert. denied, 421 U.S. 964 (1976); U.S. vs. Bledsoe, 531 F. 2d 882 (8th Cir. 1976). Introduction of prejudicial and inflammatory material by the Assistant United States Attorney as was done in the instant case is plain error and is reversible, since it denied defendant Yagy's right to a fair trial. U.S. vs. Burse, 531 F.2d 1151 (2d Cir. 1976).

Such conduct is the equivalent of depriving defendant Yagy of due process and violating his Sixth Amendment rights. It should be construed in the same vein as introducing specific misleading evidence, although done indirectly, or the non-disclosure of specific evidence valuable to the defense.

U.S. vs. Agurs, 427 U.S. 97 (1976); Donnelly vs. DeChristoforo, 416 U.S. 637 (1974); Miller vs. Pate, 386 U.S. 1 (1967); Brady vs. Maryland, 373 U.S. 83 (1963); Hall vs. U.S., 150 U.S. 76 (1893); U.S. vs. Stofsky, 527 F.2d 237 (2d Cir. 1975), cert. denied, 425 U.S. 902 (1976); U.S. vs. Morrell, 524 F. 2d 550 (2d Cir. 1975); People vs. Luberto, 212 App. Div. 691 (3d Dept. 1925); Hilyard vs. State, 214 P.2d 953 (Okla. 1950).

POINT IV

THE COURT ERRED IN ALLOWING POST
INDICTMENT-ARREST STATEMENT OF
DEFENDANT SCHWARTZ INTO EVIDENCE.

Defendant Yagy contended throughout the trial that defendant Schwartz's confession was improperly received into evidence because said confession had been obtained from defendant Schwartz after Schwartz had been indicted and arrested based upon said indictment and prior to his arraignment, all in violation of Rule 9(c), (1) F.R. Crim. P., 18 U.S.C. Section 3501 (c); the Sixth Amendment of the Federal Constitution and Massiah vs. U.S., 377 U.S. 201 (1964).

It is obvious from reading the transcript of testimony that the FBI agents transported defendant Schwartz from the Bronx, New York to the FBI office at New Rochelle, New York, for purposes of not only processing defendant Schwartz, but also to interrogate him. Sometime after receiving his Miranda rights, defendant Schwartz gave certain statements incriminating himself and others in several serious matters. The FBI agents, after having satisfied itself, then transported defendant Schwartz to New York City for arraignment before a U.S. Magistrate, but only after defendant Schwartz was again interrogated by an Assistant U.S. Attorney at the U.S. Courthouse in Manhattan. Finally, at approximately

4:30 P.M., more than eight hours after defendant Schwartz was arrested, he was arraigned, all without benefit of counsel until arraignment.

If Massiah has any meaning, it must then apply explicitly in the instant case. The reading and signing of Miranda warnings and rights does not create a waiver of the rights under Massiah since the Massiah rights are constitutional rights. U.S. vs. Satterfield, 417 F. Supp. 293 (S.D. N.Y. 1976), modified in part, 417 F. Supp. 303 (1976). Judge Friendly, in a dissenting opinion, expressed doubts whether the Massiah rights could ever be waived. U.S. vs. Massimo, 432 F. 2d 324 (2d Cir. 1970), cert. den. 400 U.S. 1022. However, Judge Knapp held that:

"* * * After indictment the advice of counsel can be waived only after such warnings and explanations as would justify a Court in permitting a defendant to proceed pro se at trial." 417 F. Supp. at 296; Faretta vs. California, 422 U.S. 806.

The Court further held that:

"* * * The Massiah rule does for defendant at least part of what counsel would do if present. It permits him to cooperate under conditions such that - while he may or may not succeed in benefiting himself, he at least is protected from harm." 417 F. Supp. at 297.

The Court further stated:

"The statement is suppressed not because any agent needs to be reproved, but simply because it cannot be said that an indicted defendant is being protected by 'all the procedural safeguards of the law' if in an interrogating session he may waive counsel any more easily than he could in open court." 417 F. Supp. at 297.

The Court further was of the opinion that the Massiah doctrine

could not be satisfied like the Miranda doctrine by simply reading or signing any formula printed on a card.

We wish to point out that Rule 9(c), (1) F.R. Crim. P. differs substantially from Rule 5 in that Rule 9 requires a defendant arrested pursuant to an indictment to be arraigned promptly, as distinguished from a defendant arraigned upon a complaint under Rule 5, who is to be arraigned "without unnecessary delay." Congress, in its legislative wisdom, and perhaps with the knowledge that Massiah vs. U.S. had been decided in 1964, intended the word "promptly" to mean exactly what it said. Taking photographs, fingerprints and a pedigree of a defendant arrested after indictment may be an accepted administrative act, but combining it with the purpose to interrogate the defendant is forbidden. Defendant Schwartz was entitled to counsel immediately upon his arrest. The record fails to indicate that the FBI agents fully explained to said defendant his rights under Massiah as compared to his rights under Miranda. Brewer vs. Williams, 51 L. Ed. 2d 424, 20 Cr. L. 3095.

The United States Supreme Court recently in Brewer vs. Williams, Supra, has held that the clear rule of Massiah to be that "Once adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him." There is mixed opinion whether the Brewer decision has adopted the minority of lower

Court holdings that Massiah requires suppression of all statements made in the absence of counsel after commencement of adversary proceedings, and not only statements made in response to interrogation, but volunteered statements as well. It would appear from the Brewer decision that there may be a waiver of Massiah rights. However, the question is, what is the burden of proof upon the government in proving a waiver of Massiah rights? Recently, the Second Circuit Court of Appeals in U.S. vs. Satterfield, F. 2d (2d 1976, Docket No. 76-1372, slip OP, Page 805, 12/7/76) adopted the position that the government has a higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached; see also, U.S. ex rel Lopez vs. Zelker, 344 F. Supp. 1050 (S.D. N.Y. 1972), aff'd. W.OP. 465 F.2d 1405 (2d Cir. 1972). The Brewer court did refer, however, to Johnson vs. Zerbst, 304 U.S. 458 (1938) in which the Supreme Court used as a test to determine waiver of constitutional rights "an intentional relinquishment or abandonment of a known right or privilege." Brewer vs. Williams, 51 L. Ed. 2d 424 (1977), 20 CR. L. at 3100; see also, 177 N. Y. L.J. (Vol. 94) 1 (5/16/77), 177 N.Y. L.J. (Vol. 95) 1 (5/17/77) and U.S. vs. Duvall, 537 F. 2d 15 (2d Cir. 1976).

(Although not an indictment-arrest case itself, the language regarding Miranda and Massiah rights and waiver are the same

and "pre-arraignment interviews" have some interest to the problem herein stated).

Admission of defendant Schwartz's inculpatory statement was prejudicial not only to defendant Schwartz but to defendant Yagy since it further buttressed the testimony of the witness Hook, the unindicted co-conspirator, in at least ten or eleven matters; it added credence to witness Hook, and, if the charge given by the trial judge regarding facts that may have been found from defendant Schwartz's statement could be applied to defendant Yagy, if in fact conspiracy was found to have existed, said statement was then most prejudicial. One must keep in mind that the sole testimony against defendant Yagy is that of unindicted co-conspirator witness Hook, which testimony is subject to scrutiny and close examination and to be received with caution. Any other evidence or testimony received from other sources that would tend to buttress or give credence to witness Hook's testimony is of a material nature. If it is error to receive defendant Schwartz's confession, then said error is not harmless but rather plain error. See, U.S. vs. Floyd, F.2d (2d Cir. #76-1462 5/16/77), 21 CR. L. 2198.

It has been held that post arrests statements made by a co-conspirator, after conspiracy has been concluded, are not admissible against other codefendants and any facts derived from said statements, as they may apply to the declarant

are not applicable to other co-defendants. In any event, said statement should be excluded; otherwise a trial severance should have been granted. U.S. vs. Smith, 520 F. 2d 1245 (8th Cir. 1975); U.S. vs. Garcia, 530 F.2d 650 (5th Cir. 1976); U.S. vs. Thompson, 533 F. 2d 1006 (6th Cir. 1976), cert. denied, U.S. (1977); U.S. vs. Floyd, F. 2d (2d Cir. 5/16/77), 21 CR. L. 2198.

In addition to the foregoing, the trial court should have stricken the testimony of the FBI agent regarding the confessions and/or other statements given by defendant Schwartz on the grounds that the FBI agent had destroyed his rough interview notes after the same had reportedly been reduced to typewritten fashion. The Court in U.S. vs. Harris, 543 F. 2d 1247 (9th Cir. 1976), has held:

"Notes taken by FBI agents in interviews either with prospective government witnesses or, as in this case, with the accused, constitute potentially discoverable materials. * * * Since the routine disposal of potentially produceable materials by the FBI amounts to a usurpation of the judicial function of determining what evidence must be produced in a criminal case, we hold that such original or rough interview notes must be preserved." 543 F. 2d 1247 at
See also, U.S. vs. Johnson, 525 F. 2d 999, 1003-1004 (2d Cir. 1975); cert. denied, 96 S. Ct. 1127 (1976); U.S. vs. Crisona, 416 F. 2d 107, 114-115 (2d Cir. 1969), cert. denied, 394 U.S. 961 (1970).

But see, U.S. vs. Anzalone, F. 2d (2d Cir. 1977, #76-1458), and U.S. v. DiStefano, F. 2d (2d Cir. 1977, #76-1581), contra.

POINT V

THE COURT ERRED WHEN IT ALLOWED
ALLEGED EXCULPATORY STATEMENT OF
DEFENDANT LORD INTO EVIDENCE.

The exculpatory statements obtained from defendant Lord after termination of the conspiracy, which statements appeared to be false, should not have been admitted into evidence since they were prejudicial to defendant Yagy. Again, one must keep in mind that the sole witness against defendant Yagy was un-indicted co-conspirator witness Hook. An exculpatory statement, which turns out to be false, may very well be inculpatory and under certain circumstances may require the giving of a Miranda or Escobedo warning or advice. The Supreme Court in Miranda recognized that an exculpatory statement may be as dangerous as an inculpatory statement and that forewarnings and effective waivers may under certain circumstances be required. Miranda vs. State of Arizona, 384 U.S. 436, 476-477.

If post-conspiracy inculpatory statements are not admissible by one co-conspirator against a co-defendant under U.S. vs. Floyd,

F.2d (2nd Cir. 5/16/77), 21 CR. L. 2198 then, it would appear that false exculpatory statements given by an alleged co-conspirator, which would be prejudicial to a co-defendant, should also be excluded.

POINT VI

TRIAL COURT ERRED IN APPLYING A PRIMA FACIE STANDARD RATHER THAN A PREPONDERANCE OF THE EVIDENCE STANDARD PURSUANT TO F.R.EV.104 ON THE ISSUE OF CONSPIRACY AND THE COURT'S REPEATED COMMENT, BEFORE THE JURY, THAT A PRIMA FACIE SHOWING OF CONSPIRACY INVOLVING THE FOUR DEFENDANTS WAS PREJUDICIAL AND PLAIN ERROR.

Defendant Yagy objected to any testimony on the part of witness Hook as to transactions and conversations that occurred at the Tip Top Restaurant and thereafter, all out of the absence of defendant Yagy. (T.M. at 460-461). The objection was overruled and the Court stated, with respect to the charge of conspiracy:

"I have come to the point where there has been a satisfactory showing - - I am not taking away this ultimate decision from you - - in my determination at this time there has been a satisfactory showing from which, if you want to, you could determine that a conspiracy had come into being involving these four people for this purpose. Whether or not it came into being and who was a member is going to be for your ultimate decision, but at this point I now am admitting evidence by - - well, statements and actions by Mr. Lord or Mr. Schwartz in this case in the absence of Mr. Yagy, and if you find there was a conspiracy, and if you find Mr. Yagy was a member of it, then that testimony and evidence can bear against Mr. Yagy. I will tell you more about that in the future.

Mr. Colicchio: For the record, I wish to note defendant Yagy's objection to any comments by the Court as to a satisfactory showing at this particular time.

The Court: I am not making the determination, I am only making the ruling that there now is in the case a sufficient amount of evidence which, if the jury did find there was a conspiracy with Mr. Yagy being a member of it, it would be sustained. Whether there was is their determination, not mine.

Mr. Kremer: On behalf of defendant Lord, I take exception to the Court's determination and the Court's ruling.

The Court: It is a procedural determination, the ultimate fact will be determined by you the jury." (T.M. at 461-463).

Rule 104, Federal Rules of Evidence, recently amended, places the burden directly upon the Court to make a determination by a preponderance of the evidence whether sufficient non-hearsay evidence of conspiracy has been introduced to justify the admission of hearsay evidence. Formerly, the jury performed the prominent role in deciding whether the co-conspirator exception could be invoked. New Rule 104 now requires the application of a higher standard in the determination to be made by the trial judge. Under the new rules, the jury has a narrow responsibility for deciding questions of admissibility. U.S. vs. Petrozziello, 548 F.2d 20 (1st Cir. 1977); Fed. R. Evid. 104(a), (b)). As pointed out in Petrozziello, a finding of a prima facie case is not the same as "determining" that a conspiracy existed. The Court of Appeals in Petrozziello also admonished against bootstrapping the Court's determination by use of inappropriate hearsay testimony for purposes of making said "determination."

Glasser vs. U.S., 315 U.S. 60 (1942)

The trial court's dialogue before the jury that, in the Court's opinion, prima facie showing of conspiracy had been established and that if the jury so found a conspiracy involving the four defendants that said verdict would be sustained, is extremely prejudicial, plain error, and a violation of defendant Yagy's Sixth Amendment rights. Michigan vs. Mosley, 423 U.S. 96 (1975), on remand, People vs. Mosley,

Mich. (11/22/76), 20 Cr.L. 2427; U.S. vs.

Bear Killer, 534 F.2d 1253 (8th Cir. 1976). As stated in People vs. Mosley:

"The effect of the instruction delivered is to stamp upon the confession the endorsement of the Court and substantially deprive the defendant of his right to a jury determination of whether the statement had been made, and if so, the weight to be afforded it." 20 Cr.L. 2427.

There appears to be conflicting opinions on the effect of new Rule 104, as hereinbefore discussed. It would appear that in the Court of Appeals, 2nd circuit, a jury verdict on the ultimate issue of conspiracy is entirely separate from a judge's determination of conspiracy for evidentiary purposes, thus, whether or not a conspiracy exists and defendant Yagy's connection with said conspiracy must be based upon proof beyond a reasonable doubt. U.S. vs. Zane, 495 F.2d 583 (2d Cir. 1974). The Court's test for purposes of making its "determination" is

"fair preponderance of evidence independent of hearsay utterance." U.S. vs. Torres, 519 F.2d 723 (2d Cir. 1975); U.S. vs. Wiley, 519 F.2d 1348 (2d Cir. 1975); U.S. vs. Lam Lek Chong, 544 F.2d 58 (2d Cir. 1976); U.S. vs. One 1975 Lincoln Continental, 72 F.R.D. 535 (S.D. N.Y. 1976). For an excellent discussion of these issues, see 177 N.Y.L.J. (Vol. 92) 1, (5/12/77) "Developments and Trends in Evidence", Rothstein, Paul F., continued in 177 N.Y.L.J. (Vol. 111) 1 (6/9/77).

POINT VII

THERE HAS BEEN A FAILURE OF PROOF AGAINST
DEFENDANT YAGY.

Trial court properly charged that the prosecution must first prove that a conspiracy existed, and that the members thereof, including defendant Yagy, agreed in some fashion or came to a mutual understanding to try to accomplish the common and unlawful plan. The fact that defendant Yagy happened to act in a way which furthered an object or purpose of the conspiracy did not make him a conspirator. (T.M. at 902-903).

The record is completely devoid of any proof that defendant Yagy agreed to participate in the conspiracy, as charged. His presence at the pizza shop or his presence as a passenger in an automobile, or his presence with witness Hook on the morning of the alleged robbery, if all these items are believed to be true, do not establish beyond a reasonable doubt that defendant Yagy agreed to participate in a conspiracy to rob Columbia Bank. Failure of proof of an agreement or having proved an agreement, then failure to prove the nature of the agreement, is insufficient to support a conviction under 18 U.S.C. Section 371. U.S. vs. Rosenblatt, F. 2d (2d Cir. 1974), 21 CR. L. 2131; U.S. vs. DiStefano F. 2d (2d Cir., #76-1581, 1977); U.S. vs. Cirillo, 499 F. 2d 872 (2d Cir. 1974), cert. den., 419 U.S. 1056 (1974); Baker vs. U.S., 395 F. 2d 368 (8th Cir. 1968); U.S. vs. Jones, 418 F. 2d 818 (8th Cir. 1969); U.S. vs. Garrett, 371 F. 2d 296 (7th Cir. 1966).

The proof is also insufficient to sustain a conviction of aiding and abetting. U. S. v. Mariani, 539 F. 2d 915 (2d Cir. 1976); U.S. vs. DiStefano, F. 2d (2d Cir., #76-1581, 1977).

Each defendant's participation in this conspiracy must be determined individually by his own actions and declarations. U.S. vs. Arnedo-Sarmiento, 545 F. 2d 785 (2d Cir. 1976). Although defendant Yagy's knowledge of the purpose of the conspiracy may be inferred from circumstances, acts and conduct of the parties, during the course of the conspiracy, the evidence of defendant Yagy's knowledge of said purpose must be clear and unequivocal. Jacobs vs. U.S., 395 F. 2d 469 (8th Cir. 1968). Statements made by alleged co-conspirators after the conspiracy is terminated are not admissible against defendant Yagy under any circumstances. U.S. vs. Floyd, F. 2d , (2d Cir. 1977), 21 CR. L. 2199; U.S. vs. Smith, 520 F. 2d 1245 (8th Cir. 1975); Grunewald vs. U.S. 353 U.S. 391 (1957); Krulewitch vs. U.S., 336 U.S. 440 (1949).

POINT VIII

THE SENTENCE GIVEN TO DEFENDANT YAGY WAS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT; THAT THE SENTENCES WERE EXCESSIVE, AND THAT THE SENTENCES CONSTITUTE MULTIPLE SENTENCES FOR BASICALLY THE SAME ELEMENTS.

Defendant Yagy, age 45, married with wife and five children, under medical care for diabetes, blood pressure, heart and anxiety problems (see attached medical statements), and who, had a fairly decent record, was given consecutive sentences of ten years for bank robbery and five years for conspiracy.

Generally, it is within the trial court's discretion to levy sentence within statutory limitations. U.S. vs. Arnedo-Sarmiento, 545 F.2d 785, 795 (2d Cir. 1976); U.S. vs. Driscoll, 496 F.2d 252-253, 254 (2d Cir. 1974). A court may not impose more than one sentence unless defendant has been convicted of more than one offense, Lander vs. U.S., 358 U.S. (1958); Bell vs. U.S., 349 U.S. 81 (1955). A single offense can be charged in more than one count, conviction on a multiplicity of counts does not necessarily justify more than one sentence. 1 C. Wright, Section 142, at 311. Generally, the existence of multiple offenses depends on whether each offense requires proof of a fact not required by another. However, multiple sentences are prohibited if the elements of each count effectively are identical. U.S. vs. Austin, 529 F.2d 559, 563-564, (6th Cir. 1976) (conspiracy and aiding and abetting). The Court in Austin vacated a sentence imposed on a conspiracy count

which charged the same offense as a substantive count for aiding and abetting a bribe. See also, Prince vs. U.S., 352 U.S. 322 (1957); U.S. vs. Gaddis, 424 U.S. 544 (1976); U.S. vs. Stewart, 523 F. 2d 1263, 1264 (2d Cir. 1975).

Defendant Yagy was charged with violations of 18 U.S.C. 2113(a) as an aider and abettor and 18 U.S.C. 371, that being a conspiracy to commit the crime alleged in Section 2113(a). (T.M. 897-900). It would seem that if there is no distinction between being a conspirator and an aider and abettor, we contend that the multiple sentencing of Gerald Yagy was improper under the circumstances. U.S. v. Sperling, ___ F. 2d ___ (2d Cir. #76-1269, 1977); U.S. vs. Austin, 529 F. 2d 559, (6th Cir. 1976).

Secondly, we contend that the consecutive sentences needed out to defendant Yagy were excessive and constituted cruel and unusual punishment in violation of his Eighth Amendment rights. Weems vs. U.S., 217 U.S. 349 (1910); Furman vs. Georgia, 408 U.S. 238, 279 (1977); U.S. vs. Robin, 545 F. 2d 775 (2d Cir. 1976), reaffirming prior opinion, ___ F. 2d ___ (2d Cir. 1977), 21 CR. L. 2060; Hart vs. Coiner, 483 F. 2d 136 (4th Cir. 1974); Davis vs. Davis, ___ F. Supp. ___ (D.C. W. Va. 1977), 21 CR. L. 2158.

As early as 1910, the Supreme Court stated in Weems vs. U.S., 217 U.S. 344, that the length of a sentence might give rise to an Eighth Amendment violation and that the Eighth Amendment is a:

" * * * A clause - may be - progressive and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. at 378.

Again, the Supreme Court stated in Trop vs. Dulles, 356 U.S. 86 (1958) the Eighth Amendment:

"* * * Must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101.

In Gregg vs. Georgia, 428 U.S. 152 (1976) we learn a lesson that the proportionality test may be applied to a claim that an otherwise constitutional statute is being applied disproportionately in a particular case.

In Hart vs. Coiner, 483 F. 2d 136 (4th Cir. 1974), cert. den. 415 U.S. 983, reh. den. 416 U.S. 9169, cert. den. 416 U.S. 973, the Fourth Circuit employed a four-prong proportionality test striking down a long term sentence, consisting of the following:

1. Nature of offense.
2. Purpose behind punishment.
3. Manner in which other jurisdictions treat the same offense.
4. Manner in which federal courts in the same jurisdiction punish other crimes.

Recently, in Davis vs. Davis, Supra, the Court added a fifth factor, to wit: The range of sentences imposed in other Virginia marijuana cases (Federal District Court - New York - robbery and conspiracy cases). The Court in Davis vs. Davis held that excessiveness is the hallmark of cruel and unusual punishment. The Court pointed to Downey vs. Perini, 518 F. 2d, 1288 (6th Cir. 1975), vacated on other grounds, 423 U.S. 933 (1975) which accepted the proposition that the length of a sentence alone can render a sentence cruel and unusual. The Court also pointed out that:

"The important factor is not that the legislative purpose could be served by a less severe punishment, for that is a judgment for legislatures to make, but that it could be served by a "significantly less severe punishment". If there is a significantly

less severe punishment adequate to achieve the purpose for which the punishment is inflicted (Citations omitted) the punishment inflicted is unnecessary and therefore excessive." Furman vs. Georgia, 408 U.S. 238, 279. F. Supp. (D.C. W.Va. 1977); 21 CR. L. 2157, 2158.

We contend that when we consider defendant Yagy's minimal involvement, if the unindicted co-conspirator witness Hook's testimony shall be believed, for he is the only witness against defendant Yagy, that the sentences levied against defendant Yagy were excessive, cruel and unusual punishment and that there was a significantly less severe punishment that could and should have been levied against defendant Yagy. In further support of our position, let us then consider the fifth point expounded in Davis vs. Davis, Supra, that is, how the Federal District Courts in New York have sentenced an aider and abettor-conspirator, under the same circumstances as defendant Yagy for the same or similar charges. Recently, in U.S. vs. Mims, F. 2d (2d Cir. Docket No. 76-1444, 1977) defendant Mims was convicted of same or similar charges as defendant Yagy. However, he was sentenced by District Court Judge Harold P. Burke to a term of eight years. The robbery in the Mims case, as in Yagy's case, occurred in Rochester, New York, both defendants were tried in the same Federal District Court, both defendants were, at best, if all proof is believed, aiders and abettors and conspirators within approximately one year of each other. Yet Mr. Mims was sentenced to a term of eight years by Judge Burke, and Mr. Yagy was sentenced to a total consecutive term of fifteen years by Judge Elfvin. There is no apparent rhyme or reason for

this severe discrepancy. The Court of Appeals, Second Circuit, in U.S. vs. Robin, 545 F. 2d 775 (2d Cir. 1976), stated in a case where a first offender, approximately 49 years of age, married and with a family, was given a thirty year sentence, that;

"Recognizing that substantial disparities and sentences exist and that they are of severe concern to those involved in the judicial system, we are especially concerned when a harsh sentence is imposed upon so questionable a foundation as existed in this case."
545 F. 2d

Judge Lumhard in U.S. vs. Stein, 544 F. 2d 96 (2d Cir. 1976) (concurring opinion) adopted the position that an excessive sentence may be cruel and unusual punishment in violation of Eighth Amendment rights and he cited for authority Hart vs. Coiner, 483 F. 2d 136, Weems vs. U. S., 217 U.S. 344 and Downey vs. Perini, 518 F. 2d 1288.

Looking beyond Federal District Courts in New York State, we need only to look to California in the internationally famous case of Patricia Hearst. Given all its pretrial publicity, nationwide investigations, extensive use of firearms, bombings, militant and revolutionary groups, shootings, and extensive expenditures in locating, arresting and trying defendant Hearst, we find that she recently received a seven year sentence, together with an eloquent statement of the Court's feelings for the parents' anguish and anxieties throughout Miss Hearst's unfortunate ventures and escapades.

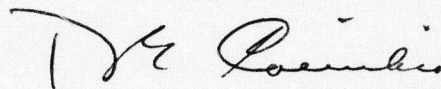
We contend that in the event the Court shall affirm the jury's verdicts against defendant Yagy for bank robbery and conspiracy, then in that event, there should not have been multiple sentences; that the sentences as levied were excessive,

cruel and unusual punishment; that the sentences should have been less, and, if multiple sentences are permitted, then they should run concurrently and not consecutively.

CONCLUSION

DEFENDANT YAGY'S CONVICTION SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL ON BOTH COUNTS OR IN THE ALTERNATIVE, THE SENTENCE BASED ON CONSPIRACY SHOULD BE VACATED AND THE MATTER REMANDED ACCORDINGLY OR IN THE ALTERNATIVE, THE SENTENCE BASED ON BANK ROBBERY SHOULD BE VACATED AND THE MATTER REMANDED ACCORDINGLY.

Respectfully submitted,



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Tel. No. (716) 325-5494

PATIENT'S NAME	AGE	SEX	RACE	SOCIAL SECURITY NO.	CLAIM NO.	NAME OF HOSPITAL
YAGY, Gerald J.	41	M	W	087-26-9095	C-19879587	Batavia VA Hospital

DIAGNOSES (List in numerical order: first, the established clinical diagnosis responsible for the major part of patient's stay; then, in order of clinical importance, other established diagnoses for which treatment was given. Place letter "N" before diagnosis(es) responsible for Nursing Care placement. List Problem numbers after diagnosis.)

ICDA CODE

Diabetes (#5)
 Anxiety (#6)
 Right inguinal hernia (#13)
 Inferior wall infarct (#14)

PERTINENT CLINICAL DIAGNOSES NOTED BUT NOT TREATED (Include autopsy diagnoses not listed as clinical above)

Allergic to Penicillin

OPERATIONS PROCEDURES PERFORMED AT THIS HOSPITAL DURING CURRENT ADMISSION

DATE

SUMMARY (Brief statement should include, if applicable, history; pertinent physical findings; course in hospital; treatment given; condition at release; date patient is capable of returning to full employment; period of convalescence, if required; recommendations for follow-up treatment; medications furnished at release; competency opinion when required; rehabilitation potential; and name of Nursing Home, if known.)

Mr. Yagy was admitted for the control of diabetes and also to rule out the presence of coronary artery disease.

PROBLEM #5: Diabetes.

Mr. Yagy is known to have diabetes for the past several years and lately had been on NPH Insulin. I saw him in the Clinic on 5-5-77 and as he had persistent glycosuria, I advised admission. He was not sticking to his diet as recommended.

The system review showed that he had gained 18 lbs. since last discharged. He had occasional weakness in the right leg when starting to walk. It again showed a history of myocardial infarction in the past, and he had angina some years ago. The patient had lately felt bloating after eating.

The physical examination showed a height of 68½" and a weight of 219 lbs. His blood pressure was 110/80. The pulse was 80 and the temperature was 98. The fundi showed arterial narrowing. The left shoulder was painful in 90 to 120 degrees arc. There was tenderness in the right upper quadrant and also in the left lower quadrant. This tenderness was vague and no organomegaly was felt. There were no abdominal masses either. The rectal examination was negative.

The admission Lab. data included RPRCT which was nonreactive. The hemoglobin was 16.9, hematocrit 50, RBC count 5.46 million. The WBC count was 7,900 with a normal differential count. The platelets were adequate and MCV was 94. The blood sugar was 267. At that time the BUN was 15, electrolytes were normal and total protein was 9.1 with an alkaline phosphatase of 85, SGOT 22, bilirubin 0.3. The total protein electrophoresis showed an albumin of 4.5; alpha 1 0.4; alpha 2 1.0, Beta 1.3 and gamma 1.9. The A/G ratio was 1.0.

The chest x-ray was unremarkable. The electrocardiogram showed old (Over)

ADMISSION DATE	DISCHARGE DATE	TYPE OF RELEASE	INPATIENT DAYS	ABSENCE DAYS	WARD NO.	SIGNATURE OF PHYSICIAN
5-9-77	6-9-77	OPT-NSC	31		B	V. DATE, M.D. Chief, Medical Service

VA FORM
MAY 1972

10-1000

EXISTING STOCK OF VA FORM 10-1000,
JAN 1971, WILL BE USED.

HOSPITAL SUMMARY

inferior wall infarct and when this EKG was compared with one in December of 1976, there was no change.

The patient was started on a 1400 calorie diet and NPH Insulin was given in the dose of 20 units. With this regimen, his diabetes quickly came under control and we were able to reduce his Insulin to 15 units without showing glycosuria. His glucose levels in the blood also dropped to a fasting of 118. The 4:00 p.m. blood sugar was 144. His cholesterol which was 308 at the time of admission, had dropped to 238 about one week prior to discharge. He was to continue on his diet and to continue to take 15 units of NPH. He was advised to test his urine four times a day and maintain a chart.

PROBLEM #6: Anxiety.

The patient had complained of dizziness and tendency to fall occasionally. The neurological examination was essentially noncontributory. He was seen by Dr. Rotenberg who felt that these were probably psychosomatic symptoms. However, he advised to rule out cerebellopontine angle tumor.

The skull x-rays, which included tomography of petrous bones and Stenver's view of the petrous bone, were both considered to be essentially normal. He was also seen by Dr. Marsh, our consulting neurologist, who did not find any evidence of cerebellopontine lesion. It was felt that his episodes of dizziness are secondary to his anxiety.

PROBLEM #13: Right inguinal hernia.

Because of his abdominal pain and because of the recent history of apparent renal lithiasis, he was investigated for the possibility of renal stones. It may be noted here that he was seen in St. Mary's Hospital about a month ago where apparently renal stones were diagnosed. The patient on admission did produce a small stone which he said he had passed a few days prior to admission. This stone was sent to the Lab. and was diagnosed to be consisting of calcium and phosphate. The urinalysis results were mentioned above and the urine culture was negative.

The patient had abdominal x-rays and I.V.P. which failed to reveal any renal stones. Because of his persistent pain, however, a surgical consultation was obtained and a right inguinal bubonocoele was diagnosed. Dr. Dadlani who saw him in consultation feels that he is not a candidate yet for surgery.

PROBLEM #14: Inferior wall infarct.

The patient's EKG showed an inferior wall infarct. The history had some elements of angina. These have been frequent lately and had lasted for about 30 minutes. There was a family history of coronary artery disease, hypertension, diabetes, and CVA.

The patient was seen in consultation by Dr. Busog, our Cardiologist, and a stress test was performed. This showed equivocal evidence of ischemia. It was likely that this test will have to be repeated after the interval of a few months. It is felt that because of the diabetes and because of hernia, and because of possible coronary artery disease and a diagnosis of inferior wall infarct, that the patient should not lift more than 15 pounds and that he should not do any more activity than mild activity.

YAGY, Gerald J.
087-26-9095

CLINICAL RECORD

Report on _____

or

Continuation of S. F. _____

(Strike out one line) (Specify type of examination or data)

(Sign and date)

His other problems which were diagnosed and treated during this hospitalization include left shoulder pain which was diagnosed to be due to calcific tendonitis of the left shoulder. He was given 120 mg. of Depo-Medrol by Dr. Schmitt and this was followed by physical therapy. This helped the patient to a remarkable degree.

The patient is now being discharged and I will see him in my Clinic in Rochester in about one month's time.

V. DATE', M.D.

Chief, Medical Service

VD:dz

6-14-77

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

REGISTER NO.

WARD NO.

B

YAGY, Gerald J.

087-26-9095

DOB: 12-10-35

VAH, Batavia, N.Y.

REPORT ON _____ or CONTINUATION OF _____

Standard Form 507
507-104



VETERANS ADMINISTRATION

HOSPITAL

BATAVIA, NEW YORK 14020

June 27, 1977



IN REPLY
REFER TO: 513/136

YAGY, Gerald J.
SS#: 087-26-9095

TO WHOM IT MAY CONCERN:

In addition to the communication received by me re: Mr. Yagy, I feel that the patient needs to be seen about once a month or earlier if need arises. He should also have available to him a hospital facility to treat him on an emergency or round the clock basis.

V. Date' M.D. /
V. DATE', Chief, Med. Sq. 1

Show veteran's full name, VA file number, and social security number on all correspondence.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

AFFIDAVIT OF
PERSONAL SERVICE

JAMES R. LORD, JR., GERHARD J. SCHWARTZ,
and GERALD J. YAGY,

Docket No. 77-1157

Defendants-Respondent.

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

ALICE M. CALLAHAN, being duly sworn, deposes and
states that:

1. Deponent is not a party to this action, is over eighteen years of age, and resides at Rochester, New York.
2. That on the 28th day of June, 1977, deponent served the annexed Brief for Appellant, Gerald J. Yagy, in the above entitled matter, upon the office of Gerald J. Houlihan, Assistant U.S. Attorney, at the Federal Building, 100 State Street, Rochester, New York, one of the attorneys for the United States of America, by delivering a true copy thereof to said individual personally. Deponent knew said person so served to be Gerald J. Houlihan.

Alice M. Callahan

Sworn to before me, this
28th day of June, 1977.

Alzire Raiman
Notary Public
ALZIRE RAIMAN
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

Docket No. 77-1157

JAMES R. LORD, JR., GERHARD J. SCHWARTZ,
and GERALD J. YAGY,

Defendants-Respondent.

BRIEF FOR APPELLANT,
GERALD J. YAGY

WITH APPENDIX

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